United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 386.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*

vs.

MARIA AMACKER, J. J. AMACKER, (her husband), G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED and GEO. DIBERT, *Defendants in Error.*

ERROR TO THE UNITED STATES CIRCUIT COURT, FOR THE DISTRICT OF MONTANA.

BRIEF OF PLAINTIFF IN ERROR.

FRED. M. DUDLEY,
Attorney for Plaintiff in Error.

J. R. Lambly, the Law Printer, Spokane.

United States Circuit Court of Appeals,

FOR THE

NINTH CIRCUIT.

No. 386.

NORTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*

vs.

MARIA AMACKER, J. J. AMACKER, (her husband), G. S. HOWELL, G. GOTTHART, W. H. LITTLE, A. J. STEELE, F. H. RINGE, J. BLANK, J. JORDAN, H. B. REED and GEO. DIBERT, *Defendants in Error.*

Error to the United States Circuit Court, for the District of Montana.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Case.

This action was brought by the plaintiff in error to recover possession of the S½ of the NW¼ of section 17, township 10, north of range 3, west of the principal meridian, Montana. It was tried in the circuit court by the judge, a jury having been waived, May 23, 1892;

and judgment was entered in favor of the railroad company December 14, 1892. A writ of error was duly sued out to this court and the judgment of the lower court was reversed and the cause remanded to the circuit court for a new trial.

A new trial was had upon stipulated facts, a jury being waived, and March 3, 1897, judgment was entered in favor of the defendants in error. To correct this judgment the present writ of error is sued out.

The plaintiff in error claims title to the lands under the act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound on the Pacific coast, by the Northern route." The third section of this act provides, among other things, as follows:

"That there be, and hereby is, granted to the 'Northern 'Pacific Railroad Company,' its successors and assigns, "for the purpose of aiding in the construction of said rail-"road and telegraph line to the Pacific coast, * * * "every alternate section of public land, not mineral, "designated by odd numbers, to the amount of twenty "alternate sections per mile, on each side of said rail-"road line, as said company may adopt, through the "territories of the United States, and ten alternate sec-"tions of land per mile on each side of said railroad "whenever it passes through any state, and whenever "on the line thereof the United States have full title, "not reserved, sold, granted, or otherwise appropriated, "and free from pre-emption or other claims or rights at "the time the line of said road is definitely fixed and

"a plat thereof filed in the office of the commissioner "of the general land office;"

The sixth section provides:

"That the president of the United States shall cause "the lands to be surveyed for forty miles in width on "both sides of the entire line of said road, after the "general route shall be fixed, and as fast as may be re- "quired by the construction of said railroad; and the "odd sections of land hereby granted shall not be liable "to sale, or entry, or pre-emption before or after they "are surveyed, except by said company as provided in "this act."

The stipulated facts show a compliance with the terms and conditions of this grant such as entitles the company to the land in controversy unless it fall within some of the exceptions from the grant enumerated in the third section. The material acts of compliance with the provisions of the grant are as follows:

a. That the company accepted the grant December 29, 1864. (Record, p. 17.)

b. That it fixed the general route of its road coterminus with and within forty miles of, the land in controversy February 21, 1872; and that April 22, 1872, the commissioner of the general land office directed the local land officers to withhold from sale or location, pre-emption, or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public land falling within the forty mile limits coterminus with the general route. This order of withdrawal was received and

filed at the local land office at Helena May 6, 1872. (Record, pp. 22-23.)

c. July 6, 1882, the company definitely fixed the line of its road coterminus with the land, by filing a plat of such line of definite location in the office of the commissioner of the general land office. The land in question is within the limits of the grant as defined by this map of definite location. (Record, p. 24.)

d. Thereafter the railroad company duly constructed its road extending over the line thus definitely located, and completed the same as required by the granting act about July 1, 1883. (Record, pp. 24-25).

e. At the date of the grant the land in controversy was public land; and it is conceded to be non-mineral in character. (Record, p. 25.)

The contention of the defendant in error is that the land was excepted from the grant because of the existence of a claim or right attaching thereto at the date the line of the road coterminus therewith was definitely fixed by filing the plat thereof in the office of the commissioner of the general land office. The facts upon which this contention is based are as follows:

That October 5, 1868, one William M. Scott filed his pre-emption declaratory statement in the district land office for the S½ of the NW¼ and the N½ of the SW¼ of said section 17. (Record, p. 26.)

That May 3, 1872, William McLean applied to enter the W½ of the NW¼, the SE¼ of the NW¼ and the SW¼ of the NE¼ as a homestead under the provisions

of the act of congress approved May 20, 1862, and established a residence upon said land in September, 1872. (Record, p. 28.)

Scott, however, filed an amended declaratory statement October 20, 1869, wherein he changed the description of the land claimed by him so as to cover the S½ of the NW¼ and the NE¼ of the NW¼ of section 17. (Record, p. 27.) He abandoned the land in the fall of 1869. (Record, p. 27.) And October 14, 1872, he filed a second amended declaratory statement under the pre-emption laws. This second amended declaratory statement did not cover or include any of the land in controversy. (Record, p. 27.)

William McLean, after entering the W½ of the NW¼, the SE¼ of the NW¼, and the SW¼ of the NE¼, of said section 17 in 1872, as above stated, established his residence thereon, and lived upon the land until the spring of 1873, after which time he ceased to reside thereon. (Record, pp. 28-9.) December 1, 1874, the commissioner of the general land office wrote to the register and receiver of the local land office that McLean's entry was held for cancellation, because made subsequent to the time at which the rights of the Northern Pacific Railroad Company attached to the land in controversy. (Record, p. 29.) July 3, 1879, the register and receiver of the local land office reported to the commissioner of the general land office that December 20, 1879, McLean had been ordered to show cause within thirty days after said notice why his entry should not be cancelled; that no action had been taken; and they recommended that his entry be cancelled. September 11, 1879, the com-

missioner formally cancelled the entries and advised the local land office thereof. (Record, pp. 29-31.)

McLean died in August, 1882, leaving a widow, Maria McLean, (the defendant Maria Amacker); and March 15, 1883, Mrs. Amacker, as the widow of McLean, applied at the local land office to enter the land in controversy under the provisions of the act of congress approved June 15, 1880, and section 2291 of the revised statutes of the United States. (Record, p. 34.) This application was contested by the railroad company; but was finally decided by the secretary of the interior in favor of Mrs. McLean, March 28, 1887. (Record, pp. 34 to 44.) The grounds of the departmental decision were that the act of June 15, 1880, conferred upon the widow of the entryman a right to enter the land, which right was sufficient to except the land from the grant to the railroad company. June 17, 1887, letters patent of the United States were issued to Mrs. McLean for the land in controversy, with other lands. (Record, p. 44.) The defendants other than Maria Amacker assert title to the premises in controversy under and by virtue of conveyances from her.

Upon these facts the circuit court entered a judgment in favor of the defendant, holding that the land was excepted from the grant to the railroad company by the entries and claims described.

Assignments of Error.

First.—The court failed to hold that the land described in the complaint was reserved for the benefit of

the Northern Pacific Railroad Company from and after February 21, 1872.

Second.—The court failed to hold that the land in controversy was public land, not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other rights at the date that the said Northern Pacific Railroad coterminus with said lands was definitely fixed by the filing of a plat thereof in the office of the commissioner of the general land office.

Third.—The judgment entered is not supported by the facts found.

Fourth.—The entry of judgment for the defendants and against the plaintiff.

Points and Authorities.

I.

SCOTT'S FILING MADE OCTOBER 5, 1868, WAS CANCELED OF RECORD BY THE SUBSEQUENT FILING OF AMENDED DECLARATORY STATEMENTS.

a. October 28, 1869, Scott filed an amended declaratory statement, wherein he asserted claim to lands in part different from those included in his original statement. Under the statute he could file but one statement. Says the supreme court:

"The tract applied for in the second declaration need "not be an entirely separate and distinct parcel to call "into effect the prohibition; it is enough if there be such "addition to the original land applied for as to justify

"the designation of it, with the addition, as a different "tract. With the filing of the first declaration the ap- "plicant is limited to the land designated, whether less "or different from what he supposed he could claim, or "what he may subsequently desire to acquire. The "prohibition of the statute is without qualification or ex- "ception, and the rights of the pre-emptor must be meas- "ured by it."

Sanford v. Sanford, 139 U. S., 642, 648.

The filing of this second statement was, therefore, inconsistent with his first statement; and was a record abandonment of the claim asserted therein which operated as a cancellation of the first filing.

Amacker v. N. P. R. R. Co. (C. C. A.), 58 Fed., 850, 852.

b. The second amended declaratory statement filed by Scott October 14, 1872, did not include any of the land in controversy and was, therefore, an effectual cancellation of his first filing as far as this land is concerned.

Amacker v. N. P. R. R. Co., 58 Fed., 850, 852.

II.

THE LAND IN CONTROVERSY WAS RESERVED FROM SALE, PRE-EMPTION OR ENTRY, EXCEPT BY THE RAILROAD COMPANY, FROM AND AFTER FEBRUARY 21, 1872.

The stipulated facts establish that the general route of the road coterminus with this land and within forty miles thereof, was fixed February 21, 1872. It is settled

that the effect of section 6 of the act of July 2, 1864, is to prohibit the sale, pre-emption or entry of the lands coterminus with the line of general route and within forty miles thereof after the general route is fixed.

Buttz v. N. P. R. R. Co., 119 U. S., 55, 72.
St. Paul & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 1, 17.
Menotti v. Dillon, 167 U. S., 703, 720-1.

The land being public land at the time when the general route of the road was fixed, this prohibition against its entry at once attached.

Denny v. Dodson, 32 Fed. Rep., 899, 909.
St. Paul & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 1, 18.

III.

THE ENTRY OF MCLEAN MADE MAY 3, 1872, WAS VOID.

The land in controversy being withdraw by operation of law from sale, pre-emption or entry, was not subject to entry at the date when McLean attempted to enter the same, and his attempted entry was, therefore, void.

Van Wyck v. Knevals, 106 U. S., 360, 367.
Hamblin v. Western Land Co., 147 U. S., 531, 536.
Wood v. Beach, 156 U. S., 548, 549.

It is contended, however, that this entry was cured by the provisions of the act of congress approved April 21, 1876, entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of

railroad grants in cases where such entries have been made under the regulations of the land department."

Section one of this act provides as follows:

"Section 1. That all pre-emption and homestead "entries, or entries in compliance with any law of the "United States, of the public lands, made in good faith, "by actual settlers, upon tracts of land of not more "than one hundred and sixty acres each, within the "limits of any land grant, prior to the time when notice "of the withdrawal of the lands embraced in such grant "was received at the local land office of the district in "which such lands are situated, or after their restora- "tion to market by order of the general land office, "and where the pre-emption and homestead laws have "been complied with, and proper proofs thereof have "been made by the parties holding such tracts or par- "cels, they shall be confirmed, and patents for the same "shall issue to the parties entitled thereto."

19 Stat., 35.

We submit this statute does not support the defendants' contention.

a. If the act of 1876 is to receive a construction making it apply to the legislative reservation created by section six of the act of July 2, 1864, it must be construed as amending such section, and, *pro tanto*, repealing it. It contains no words of repeal. It is purely affirmative in its nature; and if it operates to amend and repeal the provisions of said section six so as to make the legislative reservation therein created depend upon the purely discretionary act of the executive, it

does so only by implication. Such repeals are not favored; and if the two acts can, upon any reasonable construction, stand together, such construction will be adopted; and, under this rule of construction, a general statute will not be construed as repealing a special one, unless there is a plain indication of an intention so to do.

Third Nat. Bank v. Harrison, 3 McCreary, 164.
Ex parte Crow Dog, 109 U. S., 570.
In re. Manufacturers' National Bank, 5 Bissel, 502, 508.
State v. Treasurer, 41 Mo., 24.
Sutherland on Statutory Construction, §§ 157-8-9.

The charter of the Northern Pacific Railroad Company being a special act, while the act of April 21, 1876, is general, and there being no plain indication in the act of 1876 of an intention to repeal or modify the provisions of said section six of the Northern Pacific charter, that act will not be construed as having such effect.

Nor are the two acts inconsistent. An analysis of the act of 1876 shows that it refers only to withdrawals made by executive order. It confirms entries made prior to the time "when notice of the withdrawal of the lands embraced in such grant was received at the local land office." It therefore contemplated cases where "notice of the withdrawal" was to be sent to the local land office. The sixth section of the Nothern Pacific act did not require or contemplate a sending of notice of the filing of the map to the local land office. As said in the decisions heretofore cited, the reservation became

effective, *eo instanti*, upon the filing of the map in the office of the commissioner of the general land office. If notice of that act was never sent to the local land office the withdrawal remained unaffected.

St. P. & P. R. R. Co. v. N. P. R. R. Co., 139 U. S., 1, 18.

Only by a strained construction, therefore, could the act of 1876 be held to apply to, or to affect the reservation created by, section six of the act of July 2, 1864.

This construction of the act of 1876 restricting its application to cases where notice of the withdrawal was required to be sent to the local land office, *i. e.*, to executive withdrawals, harmonizes and renders clear the terms used therein, which otherwise must be taken as used with an entire disregard for their ordinary and proper meaning.

Thus the act confirms entries made in "compliance with any law of the United States of the public lands." An act is done in compliance with a law when it is done in conformity with or under the law. The sixth section of the act of 1864 having provided that entries should not be made upon the land in controversy, it is difficult to see how an entry upon such land could be deemed an entry made "in compliance with law." And that section having taken the land in controversy out of the category of "public lands," an entry thereof would not be within the terms of the confirmatory act of 1876. And it is certainly a strained construction to hold that congress, when it confirmed entries made "in compliance with law" of the "public lands," intended to con-

firm an entry made in defiance of law upon reserved lands.

Wilcox v. Jackson, 13 Pet., 498, 514.

It should be further noted that the act provides that the entry shall be "confirmed." To confirm is to complete or establish that which was imperfect or uncertain. An entry made upon lands reserved by act of congress does not create an imperfect or voidable estate, but creates no estate whatever. It is not voidable, but is void *ab initio*.

Smelting Co. v. Kemp, 104 U. S., 636, 641.
Doolan v. Carr, 125 U. S., 618, 624, *et seq.*

And the use of the term "confirmed" in the act is not consistent with an interpretation of the act which would make it validate entries absolutely void. And although a homestead or pre-emption entry made upon lands reserved by order of the president was also forbidden by act of congress, the term "confirmed" is correctly used if the act of 1876 be restricted in its application to executive withdrawals, for the reason that the act is a legislative construction of prior executive orders of withdrawal. It is a legislative declaration that such orders of withdrawal are not effective until notice thereof is given to the local land office; and that entries made prior to such time were rightfully made and are by the act confirmed.

This interpretation of this act has received the sanction of the courts.

Taboreck v. B. & M. R. R. Co., 13 Fed. Rep., 103, 105.

B. & M. R. R. Co. v. Lawson (Ia.), 12 N. W. Rep., 229, 231.

A. T. & S. F. R. R. Co. v. Bobb, 24 Kas., 673.

Emelie v. Young, 24 Kas., 732, 743.

b. The provisions of the act of April 21, 1876, are confined to cases "where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels." The stipulated facts in this case are that McLean abandoned the land in controversy in the spring of 1873, and that he never offered proof of compliance with the homestead act. (Record, pp. 28-9, 29-34.)

IV.

THE LAND IN CONTROVERSY WAS PUBLIC LAND, NOT RESERVED, SOLD, GRANTED OR OTHERWISE APPROPRIATED, AND WAS FREE FROM PRE-EMPTION OR OTHER CLAIMS OR RIGHTS AT THE DATE WHEN THE LINE OF THE ROAD COTERMINUS THEREWITH WAS DEFINITELY FIXED BY THE FILING OF A PLAT THEREOF IN THE OFFICE OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The map of definite location was filed in the office of the commissioner of the general land office July 6, 1882. (Record, p. 24.) Prior to this time, to-wit: September 11, 1879, the entry of McLean was formally cancelled upon the land office records for failure to prove up within the time prescribed by law. (Record p. 29.) There was therefore no adverse claim to the land at the date of definite location which could defeat the grant, unless such claim arose by virtue of the provisions of the act of congress approved June 15, 1880, entitled: "An act re-

lating to the public lands of the United States." By this act congress provided:

"Section 2. That persons who have heretofore un-
"der any of the homestead laws entered lands properly
"subject to such entry, or persons to whom the right of
"those having so entered for homesteads, may have been
"attempted to be transferred by *bona fide* instrument in
"writing, may entitle themselves to said lands by pay-
"ing the government price therefor, and in no case less
"than one dollar and twenty-five cents per acre, and the
"amount heretofore paid the government upon said
"lands shall be taken as part payment of said price:
"*provided*, this shall in no wise interfere with the rights
"or claims of others who may have subsequently en-
"tered such lands under the homestead laws."

21 *Stat.*, 238.

It is urged by defendant in error that this section operated to vest in McLean and, after his death, in his widow, a right to purchase this land, which right was sufficient to exclude the land from the grant to the railroad company; and this proposition of law is the basis for the decision of the secretary of the interior relative to this land made in the contest between these parties before him. (Record, 41.)

a. The act authorizes the purchase of lands only when the lands entered were "lands properly subject to such entry." The land in question being reserved for the railroad company prior to the date of McLean's attempted entry, it did not come within the provisions of the act of 1880.

F. C. & P. R. R. Co. v. Carter, 14 L. D., 103.

b. The act of 1880 does not give a preference right of purchase—a pre-emption right or claim—attaching to the land. The privilege of purchasing the land previously entered is a privilege to be exercised only upon lands to which no intervening rights or claims have attached.

The terms employed in conferring the rights are that the parties "may entitle themselves to such lands by paying the government price therefor." These terms are not indicative of an intention to give a preference right of purchase. They are words of permission, not of grant. An examination of the various acts of congress, wherein pre-emption rights have been confirmed, show that it has been the invariable practice to designate the right conferred as a pre-emptive or preference right. The entire absence of such terms in this act coupled with the uniform use of such terms in other acts, is significant of an intention not to confer such pre-emption rights by this act.

Galliher v. Cadwell, 145 U. S., 368, 371.

This construction is further confirmed by the proviso that this right of purchase "shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws." This proviso expressly contemplates the initiation of rights and claims which shall defeat the right of purchase conferred in the first clause of the section. The term "homestead laws" is not used in a technical sense, restricting the proviso to claims and rights initiated under what are technically known as the homestead laws, but as a generic term intended to embrace all rights or

claims that may have intervened under any of the public land laws prior to the application to purchase.

Circular of Instructions of Oct. 9, 1880, 7 Copp's L. O., 142.
William White, 1 L. D., 55.
George M. Bishop, 1 L. D., 69.
Samuel L. Mitchell, 1 L. D., 97.
Pomeroy v. Wright, 2 L. D., 164.
Charles W. Martin, 3 L. D., 373.
Freise v. Hobson, 4 L. D., 580.
Lyons v. O'Shaughnessy, 5 L. D., 606.
N. P. R. R. Co. v. Elder, 6 L. D., 409.
Clement v. Henry, 6 L. D., 641.
Nuttle v. Leach, 7 L. D., 325.
Craig v. Howard, 7 L. D., 329.
Puckett v. Kaufman, 10 L. D., 410.
Havel v. Havel, 12 L. D., 320.
Williams v. Doris, 13 L. D., 487.

Any other construction of the section would make it vest in the party who had once made an entry of the land, but whose entry had been canceled for fraud, abandonment or failure to comply with the laws, a preference of right of entry which would defeat any disposition of the land except to another homestead settler. It would vest in the entryman who, as shown by the cancellation of his first entry, had done nothing to entitle himself to the consideration of the government, a pre-emptive right superior to any that the United States has ever attempted to confer upon settlers who have in good faith attempted to secure title to the public domain. It would confer upon an entryman, without merit, a perpetual prefer-

ence right of purchase which would prevent the disposition of the lands even by congress itself. Only the clearest language would justify a construction which would impute such an intention to congress.

The history of the act further confirms our construction. The purpose of the act was not to confer rights upon a meritorious class of settlers, but to give amnesty to those who were, in the eyes of the law, criminals. It was to enable those who, under the fraudulent guise of entry had removed the timber from the public domain, to condone their offences by the purchase of the land which they had robbed. See:

Congressional Record, 2d session 46th Congress, pp. 128-9, 1564-77, 3577-85, 3627-32, 4247-49.

This construction is further sustained by the decisions of the interior department and the courts.

Nathaniel Banks, 8 L. D., 532.
N. P. R. R. Co. v. Matthews, 15 L. D., 81.
Malloy v. Cook (Ala.), 10 So. Rep., 349, 350.
U. S. v. Perkins, 44 Fed. Rep., 670, 672.

The privilege of purchasing the land not being a preference right or claim, is not such a claim or right as will exclude land from the grant made by the act of July 2, 1864. It is precisely the privilege which every person had to acquire lands by purchase when offered for public sale, or for private entry. And as, notwithstanding the existence of the right to purchase, the land remained open to disposition under the general public land laws, it remained public land in the fullest

sense of the word and was not excluded from a grant which passed all lands not reserved, sold, granted or otherwise appropriated and which were free from pre-emption or other claims or rights.

c. McLean having voluntarily abandoned the land, the act of June 15, 1880, gave him no claim or right thereto. (Record, pp. 28-9.)

Amacker v. N. P. R. R. Co. (C. C. A.), 58 Fed. Rep., 850, 853-4.

d. The act of June 15, 1880, did not authorize the entry of the land by the widow of McLean.

Galliher v. Cadwell, 145 U. S., 368, 370-1.

V.

IT WAS ERROR TO ENTER JUDGMENT FOR THE DEFENDANTS AND AGAINST THE PLAINTIFF.

The land in question being public land at the date of the grant to the Northern Pacific Railroad Company; and not reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights at the date when the line of the road coterminus therewith was definitely fixed, the title passed under the grant of 1864 to the railroad company. The patent issued to Mrs. McLean was void; and the company is entitled to prevail in this action.

Respectfully submitted,

F. M. DUDLEY,
Attorney for Plaintiff in Error.